FILED
MAY 6 1999
OFFICE OF THE CLERK

No. 98-1607

In the

Supreme Court of the United States

October Term, 1998

ELEASE AMOS-GOODWIN; ANN K. HEALEY; LONNIE W. JENKINS; KENNETH A. GREENE; SABRINA G. SMITH; THERESA A. WILLIAMS; EMMY BURNELL WILLIAMS; ANNA G. CARTER,

Petitioners,

v

CHARLESTON COUNTY COUNCIL; COUNTY OF CHARLESTON; IRVIN CONDON, as Judge of the Probate Court for Charleston County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT H. HOOD
G. MARK PHILLIPS
JOSEPH C. WILSON, IV
MOLLY HOOD CRAIG
Hood Law Firm
172 Meeting Street
Charleston, SC 29402
(843) 577-4435
Counsel for Respondent The Honorable Irvin Condon

BRUCE E. MILLER
JAMES E. REEVES
WENDY KEEFER
Barnwell Whaley Patterson & Helms
134 Meeting Street
Charleston, SC 29402
(843) 577-7700
Counsel for Respondents Charleston County Council and Charleston County

QUESTIONS PRESENTED FOR REVIEW

I. WAS THE DISTRICT COURT CORRECT IN DISMISSING CHARLESTON COUNTY FROM THIS WRONGUL DISCHARGE ACTION WHEN, AS A MATTER OF LAW, THE PLAINTIFF WERE EMPLOYEES OF THE PROBATE JUDGE, NOT THE COUNTY?

II. DID DEFENDANT CONDON'S TERMINATION OF THE PLAINTIFFS VIOLATE ANY OF THEIR CONSTITUTIONAL RIGHTS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE DISTRICT COURT WAS CORRECT IN DISMISSING CHARLESTON COUNTY FROM THIS WRONGFUL DISCHARGE ACTION WHEN, AS A MATTER OF LAW, THE PLAINTIFFS WERE EMPLOYEES OF THE PROBATE JUDGE, NOT THE COUNTY. 5

II. DEFENDANT CONDON'S TERMINATION OF THE PLAINTIFFS DID NOT VIOLATE ANY OF THEIR CONSTITUTIONAL RIGHTS. 7

A. PLAINTIFFS WERE EMPLOYEES AT-WILL. 7

B. PLAINTIFFS WERE NOT TERMINATED IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS. 8

C. PLAINTIFFS CANNOT RELY ON SOUTH CAROLINA PUBLIC POLICY TO CONTEST THEIR TERMINATION. 10

D. PLAINTIFFS DID NOT REQUEST A CONTINUANCE AND, THEREFORE, CANNOT NOW ASSERT THAT THEY NEEDED ADDITIONAL DISCOVERY. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Board of County Comm'n, Wabaunsee County v. Umbehr, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996) 5

Board of County Comm'n, Wabaunsee County v. Umbehr, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996) 8

Branti v. Finkel, 445 U.S. 507, 513-16, 100 S.Ct. 1287, 1292-93 (1980) 8

Culler v. Blue Ridge Electric Cooperative, Inc., 309 S.C. 243, 422 S.E.2d 91, 93 (1992) 10

Davis v. City of Chicago, 841 F.2d 186 (7th Cir. 1988) 11

Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064 (4th Cir. 1993) 11

Elrod v. Burns, 427 U.S. 347, 359-60, 96 S.Ct. 2673, 2683 (1976) 8

Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386, 387 (1991) 10

Health v. County of Aiken, 295 S.C. 416, 368 S.E.2d 904 (1988) 5

Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213, 216 (1985) 10

Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977) 5

Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977) 8

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996) 5

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996) 8

Perry v. Sindermann, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98 (1972) 8

Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 259 S.E.2d 814 (1979) 8

Sales v. Grant, 158 F.3d 768, 779 (4th Cir. 1998) 8

Todd v. South Carolina Farm Bureau Mut. Ins., 276 S.C. 284, 278 S.E.2d 607 (1981) 8

Statutes

42 U.S.C. § 1983, ... 10

S.C. Code Ann. § 4-9-30(7) (Supp. 1998) 7

S.C. Code Ann. § 14-23-90 (1976) 1

S.C. Code Ann. § 14-23-1090 (Supp. 1998) 1

South Carolina Code § 14-23-1090 ..... 1, 5, 6, 8

§ 62-1-307 (1987) 6

STATEMENT OF THE CASE

The Plaintiffs were commissioned as Clerks of the South Carolina Probate Court "[p]ursuant to and by virtue of the power in us vested and conferred by Section 14-23-90 of the Code of Laws of South Carolina, 1976". Commissions, SJA 24 - 36.[1] Section 14-23-90 provides that clerks of the Probate Court serve and may be removed at the pleasure of the Probate Judge. S.C. Code Ann. § 14-23-90 (1976).[2] The Plaintiffs had been hired by former Probate Court Judges Gus Pearlman and Bernard Fielding. Plaintiffs have not alleged or presented any evidence that they had employment contracts.

When Defendant Condon was elected to the office of Probate Judge of Charleston County he sought the advice of E.E. Fava, Charleston County Administrator, regarding the status of these employees. Mr. Fava advised Defendant Condon that the Plaintiffs were at-will employees, and the decision as to whether or not to retain them rests entirely with Defendant Condon as the elected official. Memorandum from E.E. Fava to Defendant Condon, SJA 66 - 67.

---

[1] The actual commissions of Plaintiffs Lonnie Jenkins, Kenneth Greene, and Emmy Burnell-Williams were found in their personnel files. The personnel files of the remaining five Plaintiffs have disappeared from the probate court since the terminations. However, the book and page number from the Charleston County Clerk's Office shows the signature and dates of inception and expiration of the commissions for the other Plaintiffs. SJA 33 - 36. Plaintiffs admitted that there was no difference in their status. July 31, 1997 Hearing Transcript, JA page 41, line 21 - page 42, line 1.

[2] Section 14-23-90 was recodified as section 14-23-1090 in 1976. S.C. Code Ann. § 14-23-1090 (Supp. 1998).

Relying on Mr. Fava's advice and section 14-23-1090 of the South Carolina Code, Defendant Condon terminated the employment of the Plaintiffs with the Probate Court. Defendant Condon was unaware of any campaign efforts or political beliefs of the Plaintiffs and, therefore, could not possibly have terminated them for political reasons. Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. These are the only relevant facts that appear on the Record.

Plaintiffs filed a complaint arising out of the termination on December 13, 1996. Docket, JA 4. The complaint was amended on December 20, 1996. Docket, JA 4. The Amended Complaint alleged that Plaintiffs were employees of the State of South Carolina and/or the Probate Court for Charleston County, South Carolina, a political subdivision of the State. Plaintiffs were allegedly terminated from these positions by Defendants due to their political opposition to Defendant Condon, the newly elected Probate Court Judge. Plaintiffs alleged that this was a violation of their rights under the First and Fourteenth Amendments of the United States Constitution and the "public policy" of South Carolina. Amended Complaint, JA 9-14.

After obtaining an extension of time in which to answer, Defendant Condon answered and moved to dismiss the Amended Complaint on February 12, 1997. Docket, JA 5. Defendant Condon asserted a general denial and motions to dismiss based on the fact that Plaintiffs were at-will employees, their termination was not violative of their constitutional rights or South Carolina public policy, and the action was barred by the South Carolina Tort Claims Act, South Carolina Code § 15-78-70(a) and (b) (Supp. 1998). Answer and Motion to Dismiss of Defendant Condon, JA 16A-16F. On

July 28, 1997 Defendant Condon provided the District Court judge with a memorandum in support of the motion to dismiss or, in the alternative, for summary judgment. Defendant Condon's Memorandum, Supplemental Joint Appendix Page ("SJA") 57 - 142.[3]

On February 12, 1997, Defendant Charleston County moved to dismiss for a failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Docket, JA 5; Motion to Dismiss of Defendants Charleston County Council and Charleston County, JA 16I-16H.

In April of 1997, each of the Plaintiffs were deposed. Their testimony showed that Defendant Condon never discussed the Plaintiffs' political affiliations or beliefs prior to their termination. Deposition of Amos-Goodwin, JA 151, lines 3 - 6, JA 167, Lines 7 - 18; Deposition of Carter, JA 400, line 25 - JA 401, line 6, JA 403, lines 13 - 25; Deposition of Healey, JA 852, lines 21 - 24, JA 855, lines 4 - 7; Deposition of Jenkins, JA 588, lines 2 - 3, lines 20 - 25; Deposition of Greene, JA 984, line 17 - JA 985, line 7; Deposition of Smith, JA 340, lines 11 - 18; Deposition of Theresa Williams, JA 242, line 12 - JA 243, line 1; Emmy Burnell Williams, JA 675, lines 2 - 23.

In addition, in his verified Answers to Interrogatories, Defendant Condon stated that he was "unaware of any campaign efforts on the part of the Plaintiffs." Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. Thus, there is no conflict in the testimony on this issue.

---

[3] This memorandum is not noted in the Docket because it was provided directly to the Judge. As indicated on the first page of the memorandum, it was stamped by the Court to reflect the date that it was filed. SJA 57.

On July 31, 1997, a hearing was held on the Defendants' motions to dismiss. The District Court converted Defendant Condon's motion to dismiss to a motion for summary judgment without objection. Docket, JA 7; July 31, 1997 Hearing Transcript, JA 30, lines 17-20. At no time before or during the hearing did the Plaintiffs seek a continuance or indicate that further discovery was necessary.

By order dated September 15, 1997 and entered September 16, 1997 the District Court granted Defendant Condon's motion for summary judgment and Defendant Charleston County's motion to dismiss. Docket, JA 8; Order, JA 1095-1103. This appeal followed.

SUMMARY OF ARGUMENT

Each of the Plaintiffs were commissioned as clerks for the probate judge, Defendant Condon, and were at-will employees of Defendant Condon, not Charleston County. S.C. Code Ann. § 14-23-1090 (1997). Thus, the County could not have wrongfully discharged persons that were not its employees.

In addition, Plaintiffs have failed to present any evidence linking their termination to the exercise of any protected constitutional rights. All Plaintiffs testified that they did not inform Defendant Condon of their political beliefs and that they did not know if Defendant Condon was aware of their political beliefs. Because Defendant Condon was not even aware of the Plaintiffs' political beliefs, he could not have terminated them for those purported beliefs. Thus, Plaintiffs have presented no evidence showing a causative link between the termination and the exercise of political

rights, a necessary element to any patronage case. *Board of County Comm'n, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996); *Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN DISMISSING CHARLESTON COUNTY FROM THIS WRONGFUL DISCHARGE ACTION WHEN, AS A MATTER OF LAW, THE PLAINTIFFS WERE EMPLOYEES OF THE PROBATE JUDGE, NOT THE COUNTY.

The dismissal of Charleston County Council and the County of Charleston was not in error because the judge, not the County, was the Petitioners' employer. It is undisputed Petitioners received their commissions as clerks of the probate court from the former Probate Judge, the Honorable Bernard Fielding, pursuant to South Carolina Code § 14-23-1090. That provision states the following: "The Judge of Probate may appoint a clerk and may remove him at his pleasure." The clear language of this statute indicates the Petitioners, as clerks of the probate court, were appointed and removed, not by the County, but by an elected official, the probate judge.

Any position based on the argument that § 14-23-1090 provides for only one probate court clerk, and, thus, the probate judge had no employment powers to appoint more than one clerk under *Health v. County of Aiken*, 295

S.C. 416, 368 S.E.2d 904 (1988), is clearly negated by South Carolina Code § 62-1-307. That section provides the following: "The acts and orders which this code [the probate code] specifies as performable by the Court may be performed by either a judge or by a person, **including one or more clerks**, designated by the judge by a written order filed and recorded in the office of court." S.C. Code Ann. § 62-1-307 (1987) (emphasis added). The Petitioners' commissions clearly cite § 14-23-1090 and were filed with the court as set forth in § 62-1-307. The comments to § 62-1-307 answer the question of any perceived conflict between these two sections:

> "This section does not conflict with . . . 14-23-1090 (appointment of a clerk) of the 1976 Code, and these sections will still be applicable."

That § 14-23-1090 only authorizes the probate judge to appoint one clerk is not supported by the overall structure of the probate court or by the comments explaining other relevant sections, such as § 62-1-307. The statutes permit the probate judge to appoint more than one clerk and to remove any or all of those clerks at will.

Those persons appointed by elected officials, such as the probate judge, are routinely treated separately from county employees. For example, the laws of South Carolina include this provision:

> [E]ach county government within the authority granted by the constitution and subject to the general law of this State shall have the following enumerated powers which shall be

> exercised by the respective exercising bodies thereof:
>
> . . .
>
> (7) To develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people . . . .

S.C. Code Ann. § 4-9-30(7) (Supp. 1998) (emphasis added). As employees of an elected official, the probate judge, the Petitioners were not subject to county personnel policies and procedures and were not employees of the County.

Whether the Petitioners were employees of the County or the probate judge is purely a question of state law. Such a dispute over this issue does not warrant review by this Court, particularly where the undisputed evidence clearly supports the lower court decisions that the Petitioners were appointed by the probate judge and worked solely at the will of the probate judge pursuant to his authority under § 14-23-1090.

II. DEFENDANT CONDON'S TERMINATION OF THE PLAINTIFFS DID NOT VIOLATE ANY OF THEIR CONSTITUTIONAL RIGHTS.

A. PLAINTIFFS WERE EMPLOYEES AT-WILL.

Plaintiffs have not alleged or presented any evidence that they had an employment contract. Under South Carolina's employment at-will doctrine, employment for an

indefinite period of time without a specific contract of employment is deemed to be terminable by either party at any time and for any reason or for no reason at all. *E.g.*, *Todd v. South Carolina Farm Bureau Mut. Ins.*, 276 S.C. 284, 278 S.E.2d 607 (1981); *Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (1979).

Even more significant is the fact that the Plaintiffs' status as employees at-will is codified by statute. South Carolina Code § 14-23-1090 states that "[t]he judge of probate may appoint a clerk and may remove him at his pleasure." As argued above, all of the Plaintiffs are "clerks". Thus, as a matter of law, they are employees at-will that may be terminated for any reason or no reason at all.

B. PLAINTIFFS WERE NOT TERMINATED IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Of course, even an at-will employee cannot be fired for his or her political beliefs. *Branti v. Finkel*, 445 U.S. 507, 513-16, 100 S.Ct. 1287, 1292-93 (1980); *Elrod v. Burns*, 427 U.S. 347, 359-60, 96 S.Ct. 2673, 2683 (1976); *Perry v. Sindermann*, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98 (1972). As a first step for showing an unconstitutional "patronage" claim, the employee must prove that political or other protected activity was a substantial or motivating factor in the discharge. *Board of County Comm'n, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 2347 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725, 116 S.Ct. 2353, 2360-61 (1996); *Mt. Healthy City School Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977); *Sales v. Grant*, 158 F.3d 768, 779 (4th Cir. 1998).

Plaintiffs here have utterly failed to present any evidence showing this requisite causal link between their political beliefs and the terminations. Judge Condon's verified discovery responses state that he "did not and could not have known of [the Plaintiffs'] political beliefs". Answers to Interrogatories, SJA 3; Verification of Answers to Interrogatories, SJA 143 - 144. In addition, each Plaintiff testified at their depositions that they did not make their political beliefs known to Judge Condon and that Judge Condon did not have any reason to know of their political beliefs. Deposition of Amos-Goodwin, JA 151, lines 3 - 6, JA 167, Lines 7 - 18; Deposition of Carter, JA 400, line 25 - JA 401, line 6, JA 403, lines 13 - 25; Deposition of Healey, JA 852, lines 21 - 24, JA 855, lines 4 - 7; Deposition of Jenkins, JA 588, lines 2 - 3, lines 20 - 25; Deposition of Greene, JA 984, line 17 - JA 985, line 7; Deposition of Smith, JA 340, lines 11 - 18; Deposition of Theresa Williams, JA 242, line 12 - JA 243, line 1; Emmy Burnell Williams, JA 675, lines 2 - 23.

Because all evidence shows that Defendant Condon was unaware of the Plaintiffs political beliefs, he could not possibly have terminated them for those beliefs. Plaintiffs have presented no evidence of causation. Moreover, because all witnesses are in agreement on this point, there is no question of credibility.

Because Plaintiffs have failed to present any evidence that their termination was politically motivated, Defendant Condon is entitled to summary judgment on their constitutional claims.

C. PLAINTIFFS CANNOT RELY ON SOUTH CAROLINA PUBLIC POLICY TO CONTEST THEIR TERMINATION.

Plaintiffs also alleged in their Amended Complaint that their termination violated South Carolina public policy. South Carolina recognizes that the termination of an at-will employee in violation of a clear mandate of public policy gives rise to an action in tort for wrongful discharge. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213, 216 (1985). However, the South Carolina Supreme Court has explicitly ruled that the public policy exception to the employee at-will doctrine does not apply where the employee has an existing remedy. *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386, 387 (1991). When the employee already has an action under 42 U.S.C. § 1983, there is no tort action available. *Id.*

Even if the Plaintiffs did have an action under South Carolina tort law, their claim still fails due to the complete lack of evidence linking their political beliefs to the decision to terminate. Causation is, of course, a necessary element of any tort claim, including one for wrongful termination. *See Culler v. Blue Ridge Electric Cooperative, Inc.*, 309 S.C. 243, 422 S.E.2d 91, 93 (1992).

D. PLAINTIFFS DID NOT REQUEST A CONTINUANCE AND, THEREFORE, CANNOT NOW ASSERT THAT THEY NEEDED ADDITIONAL DISCOVERY.

Plaintiffs argue that the Court of Appeals should have reversed the District Court's order on the grounds that they needed to conduct additional discovery. Plaintiffs also

contended that summary judgment was granted even though discovery was pending. Petition for Writ of Certiorari, Page 4. Plaintiffs, however, fail to identify anything in the record supporting this argument.

The record contains neither "pending discovery" nor any indication that Plaintiffs sought a continuance from the District Court to conduct additional discovery. Indeed, counsel for Plaintiffs admitted at the hearing on this matter that their motion to amend did not "have an impact on discovery, rebriefing or what have you." July 31, 1997 Hearing Transcript, JA 31, lines 6-9.

It is well-settled that the Court of Appeals will not address issues not raised in the lower court. *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064 (4th Cir. 1993); *Davis v. City of Chicago*, 841 F.2d 186 (7th Cir. 1988). Because Plaintiffs did not request a continuance and the District Court never ruled on this issue, the Court of Appeals properly refused to address same.

CONCLUSION

Defendants would respectfully request that the Supreme Court deny Plaintiffs' petition for a writ of certiorari.

Respectfully submitted,

Robert H. Hood
G. Mark Phillips
Joseph C. Wilson, IV
Molly Hood Craig
Hood Law Firm
172 Meeting Street
Charleston, SC 29402
(843) 577-4435
fax: (843) 722-1630

Counsel for Respondent
The Honorable Irvin Condon

Bruce E. Miller
James E. Reeves
Wendy Keefer
Barnwell Whaley Patterson
& Helms
134 Meeting Street
Charleston, SC 29402
(843) 577-7700
fax: (843) 577-7708

Counsel for Respondents
Charleston County Council
and Charleston County

May 3, 1999
Charleston, South Carolina